**UNITED STATES OF AMERICA**
**BEFORE THE NATIONAL LABOR RELATIONS BOARD**
**REGION 12**

**UNION TANK CAR COMPANY**,

Employer

and Case 12-RC-221465

**INTERNATIONAL ASSOCIATION OF SHEET METAL, AIR AND RAIL TRANSPORTATION WORKERS (SMART)**,

Petitioner

**UNION TANK CAR COMPANY**

and Cases 12-CA-210779, 12-CA-219374, 12-CA-220822, 12-CA-222661

**INTERNATIONAL ASSOCIATION OF SHEET METAL, AIR AND RAIL TRANSPORTATION WORKERS (SMART)**

# COUNSEL FOR THE GENERAL COUNSEL'S BRIEF TO THE ADMINISTRATIVE LAW JUDGE

## I. Statement of the Case

After an unproductive first year of bargaining with the representative of its Valdosta, Georgia production and maintenance employees, Union Tank Car Company ("Respondent") withdrew its recognition of International Association of Sheet Metal, Air and Rail Transportation Workers ("SMART" or "the Union") on the basis of an employee disaffection petition circulated at the facility in February and March 2018. By June 9, 2018, the Union had obtained a sufficient showing of interest to file a second petition in as many years to become the collective-bargaining representative of Respondent's Valdosta employees. The election was scheduled for June 22, 2018; when the ballots were counted, 54 employees voted for the Union to represent them, and 55 voted against. There were no challenged ballots.

It is against this background that the unfair labor practices alleged in the Amended Third Consolidated Complaint and Notice of Hearing occurred. In February or March, while the disaffection petition was circulating among the workforce, supervisor Graham Bridges ("Bridges") told one employee that Respondent would look favorably on employees who signed the petition and would start looking for reasons to discharge those who did not. Bridges told a second employee that the reason he had received a 30-day suspension instead of a written warning and retraining was because the Union was in the facility. Then in June, the day before the second Union election, supervisor Jody James confiscated Union flyers while employees were on a 15-minute break in a non-working area, the break room, calling the campaign materials a federal violation. Finally, in addition to that unlawful conduct by the supervisors, Respondent also maintained two rules in its employee handbook which are facially unlawful under the National Labor Relations Act ("the Act") because they restrict employees from exercising protected Section 7 rights.

After describing the relevant facts in greater detail, this brief will address in turn the unlawfulness of the above alleged conduct, beginning with the handbook provisions. Next, the Bridges allegations will be addressed together, along with a credibility discussion of the four relevant

witnesses. Finally, the James allegation – a per se violation of the Act – will be addressed mainly via the credibility of the respective witnesses. In sum, the credible record evidence in this case will prove that Respondent violated Section 8(a)(1) of the Act in all ways alleged in the Amended Third Consolidated Complaint.

## II. Statement of Facts

### A. Employer's Operations

Respondent, a national company headquartered in Chicago, Illinois, and registered as a Delaware corporation, manufactures, repairs, and maintains railroad tank cars, including at its maintenance facility located in Valdosta, Georgia ("the Valdosta plant"). [GCX 1(dd), para. 2(a); GCX 1(y), para. 2(a); Tr. 29, 105, 131].[1] Maintenance of the tank cars entails cleaning, welding-repairs, and both coating the interior and painting the exterior of tanks. [Tr. 105, 131].

The Valdosta plant operates continuously with three shifts of workers in the repair shop. First shift is from 6:30 a.m. to 3:00 p.m.; second shift is from 2:30 p.m. to 11:00 p.m.; and third shift is 9:30 p.m. to 6:00 a.m. [Tr. 16-17, 46, 70, 86]. The first shift welding supervisor throughout 2018 has been Jody James ("James"); his second shift counterpart has been Graham Bridges ("Bridges").[2] [Tr. 15, 46, 70, 87-88, 92, 110, 147-148, 154, 176, 205, 216, 225, 230]. First shift employs approximately 18 to 22 welders, including a non-supervisory "lead man" or "lead person." [Tr. 28-29, 88-89]. James and Bridges report to Repair Manager Bill Giddens ("Giddens"), who in turn reports to Plant Manager Joe Keys ("Keys"). [Tr. 132, 154-155]. Keys and three other facilities' Plant Managers are overseen by Director of Shop Operations John Bauer ("Bauer"), who is based in Cleveland, Texas. [Tr. 143].

[1] General Counsel's Exhibits are referenced as GCX (number); the Board's Exhibits are referenced as BX (number); Respondent's Exhibits are referenced as CX (number); the Joint Exhibits are references as JX (number); and references to the Joint Stipulations, in evidence as JX 2, are noted as JS (paragraph). The hearing transcript is referenced as Tr. (page number).

[2] No relevant events happened during third shift, and the record does not reflect the name of the third shift welding supervisor.

Respondent's printed employee handbook remained the same from March 17, 2010, until approximately October 5, 2018. [JX 1; Tr. 80, 84-85, 144, 150-151]. It includes the following text:

**SHOP RULES AND PENALTIES**

> The following are rules and regulations covering offenses for which an employee can be dismissed or suspended without further notice. Suspension means lay-off without pay and may be submitted with a Record Suspension at the company's discretion. Each warning or penalty will remain active for a period of 12 months (5 years for violations of Confined Space Discipline Policy). A total of any four active offenses regardless of their classification shall result in the discharge of employees, except that if all offenses consist of only warnings, a total of five shall result in discharge. The following list is not intended to be exhaustive. It is merely intended to provide you with examples of the types of conduct that may result in disciplinary action. Misconduct not specifically described in these guidelines will be handled as warranted by the circumstances of the case involved. Also, flagrant or especially serious infractions of the rules may result in action of greater severity than shown below.

| RULE NO. | NATURE OF OFFENSE | NUMERALS IN THESE COLUMNS DENOTE DAYS EMPLOYEE WILL BE SUSPENDED | | |
|---|---|---|---|---|
| | | 1ST OFFENSE | 2ND OFFENSE | 3RD OFFENSE |
| 1 | […] | […] | […] | […] |
| […] | […] | […] | […] | […] |
| 32 | Statements either oral or in writing, which are intended to injure the reputation of the Company or its management personnel with customers or employees[3] | Discharge | | |

[…]

**USE OF TELEPHONE**

> Our telephone system needs to be able to handle the heavy load of business calls. For this reason, we ask you to limit incoming and outgoing personal calls to those that are truly necessary. Cell phones will not be allowed in use during work hours or in work areas at any time unless approved by management.[4]

[3] For purposes of brevity, this rule will be referred to herein as "Rule 32" or "the non-disparagement rule."
[4] For purposes of brevity, this rule will be referred to herein as the "no cell phones" rule.

On October 5, 2018, employees were brought into meetings, instructed that these rules had been rescinded effective December 2017, and were required to sign a form acknowledging the same and receipt of revised handbooks. [Tr. 80, 84-85, 150-151].[5]

### B. The First Representation Election and Respondent's Withdrawal of Recognition of the Union

The first representation election involving Respondent and the Union was held on February 23, 2017, and the Board certified the Union as the exclusive bargaining representative of a unit of Respondent's production and maintenance employees at the Valdosta facility on March 6, 2017. [JS 1-2; Tr. 30, 81, 132, 136-137, 140].

In around February 2018, certain employees of Respondent began circulating a petition for employees to sign to signal their disaffection with the Union as their collective-bargaining representative. [JS 4; Tr. 87-88, 156-157]. As a result of this petition, on March 9, 2018, Respondent withdrew its recognition of the Union as the exclusive bargaining representative of the unit employees. [JS 3].

### C. Supervisor Bridges' Unlawful Statements to Employees

Contemporaneously with the circulation of the disaffection petition, second-shift supervisor Bridges conversed with at least two repair welders on the subject of the Union's presence at the facility.

One afternoon in late February or early March, after a lead person urged him to sign the disaffection petition lest he lose his job, welder-repairman Quinn Sowell ("Sowell") approached Bridges, his immediate supervisor, in Bridges' office to ask whether it was true or not that he could lose his job if he did not sign the petition. [JS 4; Tr. 88-91].[6] Bridges said that Respondent could not "technically" fire him for not signing, but that they would find reasons to fire him. [Tr. 89]. Bridges

[5] Because October 5, 2018, is after the material events of this proceeding, a copy of the revised handbook was not introduced at the hearing and is not part of the record.
[6] The record reflects the name of the lead person only as "Ms. Moody" [Tr. 88-89] and "E.J. Moody" [Tr. 91-92].

then focused on how if Sowell did sign the petition, it was more likely that there would be additional opportunities for him within the company. [Tr. 90, 95]. A different lead person, Michael Weeks ("Weeks"), was also in Bridges' office, and agreed with what Bridges said. [Tr. 90, 93].

At a different time, most likely on Monday, March 5, 2018, or Monday, March 12, 2018, Bridges told another second-shift employee, Ridge Wallace ("Wallace"), that he had received a stiffer disciplinary penalty for a safety violation than he would have without the Union at the facility. [JS 4; Tr. 100-104]. Wallace had elected not to go to lunch with the rest of the shift, and Bridges approached him on the work floor and mentioned how the suspension "kind of sucks." [Tr. 102]. When Wallace agreed, Bridges then volunteered that if it weren't for the Union, Wallace would have only received a written training instead of a full 30-day suspension for failing to sign a "hot work" permit for work inside a tank car. [Tr. 102-103]. Taken aback, Wallace said, "Really?" [Tr. 103]. Bridges replied that yes, the Union wasn't letting the company do its job. [Tr. 103]. Lead person Weeks passed by Bridges and Wallace during this conversation, and agreed with Bridges, telling Wallace that if it wasn't for the Union, he would only have received a written training. [Tr. 103-104].

### D. The Second Representation Election

On June 5, 2018, the Union filed a new petition seeking to once again represent Respondent's production and maintenance employees at the Valdosta plant. [BX 1(a)]. On June 8, 2018, the Regional Director approved a Stipulated Election Agreement between the parties, setting the date of the representation election as Friday, June 22, 2018, and the location as the hourly employees' break room on the second floor. [BX 1(c)].

A few days before the election, Union representative Tommy Fisher ("Fisher"), employee TJ Daugherty ("Daugherty"), and an individual named Andy Moudy designed a pro-Union flyer for distribution at the Valdosta plant. [Tr. 15-16; GCX 2]. Daugherty brought the flyers to work on the morning of Thursday, June 21, 2018, and during the first-shift break at 8:30 a.m., distributed several

– up to 20 or 30 – in the upstairs break room and an adjoining restroom. [Tr. 16-17, 20-21, 32, 47, 72, 110-112, 184-185, 201, 226-227, 233]. First-shift employees from both the repair shop and other departments were present for the fifteen-minute set break. [Tr. 20, 38-39, 48, 225, 230]. As Daugherty sat in the break room and began to eat his breakfast, some employees began to take flyers and look at them. [Tr. 20, 73 184, 199, 218, 232]. Employees typically sit in the same groups from day to day; Daugherty was at a table with repair shop coworkers Dalton Castleberry, Dalton Corbett ("Corbett"), Chad Morgan ("Morgan"), Joe Queen ("Queen"), Ricky Reese, and Darrell Stone ("Stone"). [Tr. 18-19, 48-49, 72, 178-180, 195-198, 211, 217; GCX 3]. Lead person Tim McEady ("McEady") and Clint Selph were at a different table near the back of the room. [Tr. 73-75, 113, 180, 198, 207-208, 217; GCX 3, CX 1].

At about 8:35 a.m. or 8:40 a.m., first-shift supervisor James entered the break room. [Tr. 17, 48, 72, 178, 195]. James does not typically take breaks with the employees under his supervision, and generally only ever appears in the hourly employees' break room on Thursdays at the end of the break to conduct a weekly safety meeting for the repair shop employees at 8:45 a.m. [Tr. 17, 48, 72, 112, 195, 216, 237]. James typically conducts these meetings from a seat at the back of the room, approximately next to McEady's regular seat; James in fact sat down next to McEady on this particular morning. [Tr. 19-20, 48, 72-73, 112, 179-180, 195, 207; GCX 3; CX 1].

Within a few minutes, still before 8:45 a.m., McEady slid one of Daugherty's pro-Union flyers along the table to James, who read or skimmed the document. [Tr. 20, 73, 113, 184, 211]. Without saying anything, James rose, walked around the table where he and McEady were seated towards the table where Daugherty and the others were, approaching Queen and Morgan from behind. [Tr. 20, 49-50, 73, 113, 185; GCX 3; CX1]. Daugherty and Corbett had a clear view from across the table when James picked up a flyer that Queen was reading on the table in front of him, and took a flyer that Morgan was reading directly out of his hands. [Tr. 20, 50, 73, 113]. James

proceeded to walk around the rest of the table and picked up the other flyers still stacked there. [Tr. 20, 49-50, 73, 113, 185, 199, 211].

James returned to his seat with all the collected flyers in a single stack and sat down, stating "that's a federal violation." [Tr. 21, 50, 73, 113]. Stone asked James, "A federal violation?" [Tr. 21, 73, 113]. James, under the mistaken impression that all campaigning at the election site within 24 hours of the polls opening, repeated, "Yes, that's a federal violation right there." [Tr. 21, 73, 113, 187]. No one else spoke about what had just happened; everyone sat in stunned silence until James began the safety meeting a few moments later, at 8:45 a.m. [Tr. 21-22, 50, 73-74, 113, 186].

The next day, June 22, 2018, voting occurred in two windows, from 5:30 a.m. to 7:30 a.m. and from 3:00 p.m. to 4:00 p.m. in the break room. [BX 1(c)]. The ballots were counted immediately after the closing of the polls: out of 116 eligible voters, 109 cast valid ballots, and one other cast a ballot that was voided. [BX 1(d)]. Fifty-four (54) votes were cast in favor of the Union representing the Valdosta plant employees; fifty-five (55) votes were cast against. [BX 1(d)]. There were no challenged ballots. [BX 1(d)].

**E. Procedural History of these Cases**

Between October 31, 2017, and May 24, 2018, the Union filed several unfair labor practices charges, encompassing all but one of the unfair labor practice cases presently before the ALJ for decision. Only Case 12-CA-222661, alleging that James' break room conduct on June 21, 2018, violated Section 8(a)(1) of the Act, had not been filed at the time of the election.

On May 31, 2018, the Regional Director issued a Consolidated Complaint ("the First Consolidated Complaint") in Cases 12-CA-209024, 12-CA-214382, 12-CA-216226, 12-CA-216231, and 12-CA-219374. [GCX 1(n)]. Of these, only Case 12-CA-219374, alleging that Graham's statements to Sowell violated Section 8(a)(1) of the Act, remains in the present consolidated case before the ALJ. [GCX 1(dd)].

On June 25, 2018, the Union filed its Objection to the election, based on unlawful conduct alleged in the First Consolidated Complaint and the charge in Case 12-CA-222661, which was filed simultaneously with the Objection. [BX 1(e); GCX 1(n); GCX 1(g)].

On June 28, 2018, the Regional Director issued another Order Consolidating Cases, Second Consolidated Complaint and Notice of Hearing ("the Second Consolidated Complaint"), adding Case 12-CA-220822, alleging that Graham's statements to Wallace violated Section 8(a)(1) of the Act. [GCX 1(p)].

On August 27, 2018, the Regional Director issued the Order Consolidating Cases, Third Consolidated Complaint and Notice of Hearing ("the Third Consolidated Complaint"), adding both Case 12-CA-222661 and Case 12-CA-210779, alleging that Respondent's non-disparagement and telephone rules promulgated in its employee handbook were unlawfully overbroad and restrictive of employees' Section 7 rights. [GCX 1(u)].

On September 5, 2018, the Regional Director issued his Report on Objections, Order Directing Hearing and Consolidating Cases, and Notice of Hearing ("the RD's Report"). [GCX 1(w); BX 1(g)]. The RD's Report considered the Union's Objection – filed prior to the issuance of the Second or Third Consolidated Complaints but after the filing of all relevant unfair labor practice charges – as inclusive of all "outstanding and unresolved ULP's" filed by the Union against Respondent, i.e., all unfair labor practices alleged in the Third Consolidated Complaint. [GCX 1(w), pages 2-3; BX 1(g), pages 2-3]. Accordingly, the RD's Report found that there was potentially objectionable conduct during the critical period, both with Respondent's maintenance of its overbroad handbook rules and with James' act of confiscation on June 21, 2018. All open unfair labor practices and the representation case were consolidated for hearing. [GCX 1(w), page 3; BX 1(g), page 3].

Subsequently, on October 23, 2018, Case 12-CA-216226 was severed from this proceeding due to the unavailability of one of Respondent's witnesses for the scheduled hearing, noting that "the

allegations in Case 12-CA-216226 preceded the filing of the petition… and therefore will not affect the representation case." [GCX 1(z), page 2]. Then, on October 26, 2018, following the settlement of three of the remaining unfair labor practice cases (Cases 12-CA-209024, 12-CA-214382, and 12-CA216321), the Regional Director issued a final Order Severing Cases, Setting Location of Hearing, and Amending Third Consolidated Complaint ("the Amended Third Consolidated Complaint"). [GCX 1(dd)].

Throughout, Respondent has denied engaging in unfair labor practices or objectionable conduct of any kind. [GCX 1(o), 1(r), and 1(y)].

## III. Argument

### A. Respondent's Handbook Rules Violate Section 8(a)(1) of the Act

Respondent's Hourly Employee Handbook dated March 17, 2010, was in effect at the Valdosta plant throughout the material events of this case, including the entire critical period of the representation election. Although Respondent contends that it rescinded both of the non-disparagement and no-cell phones rules in December 2017, in response to the filing of the charge in Case 12-CA-210779, this rescission is meaningless because employees were not notified of it until about October 5, 2018. [Tr. 140]. Respondent's own witnesses acknowledge that the only transmission of the purported rescission – which itself is not supported by any documented communication record – is from a corporate officer, Bauer, the Director of Shop Operations, to middle-manager Giddens, Repair Manager. [Tr. 135, 140, 146-147, 150-151]. The ALJ should therefore find, as a matter of fact, that the March 10, 2010 Hourly Employee Handbook was in effect from its printed date until at least October 5, 2018.

In *The Boeing Company*, 365 NLRB No. 154 (2017), the Board "reassessed" the standards by which it will adjudge the lawfulness of employer work rules, ending the use of the first prong of the inquiry set forth in *Lutheran Heritage Village – Livonia*, 343 NLRB 646 (2004), i.e., that the Board

will no longer find unlawful all employer rules that employees may reasonably read to impact protected Section 7 rights. Instead,

> When evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, *and* (ii) legitimate justifications associated with the rule.

365 NLRB No. 154, slip op. at 3.[7]

The Board has rejected parties' subjective evidence of whether actual employees are aware of the rule in question, or even whether employees are capable of reading the rule, declining to place a burden of "awareness" on the General Counsel. *ImageFIRST*, 366 NLRB No. 182, slip op. at 1, fn. 3 (2018). Thus, under the *Boeing* framework, the threshold inquiry is whether a reasonable employee reading the rule in question would reasonably interpret it as interfering with the exercise of NLRA-protected rights. 365 NLRB No. 154, slip op. at 15-16 ("when the Board interprets any rule's impact on employees, the focus should rightly be on the employees' perspective"). Assuming that they do, the *amount* of that interference is then balanced against the merit of the employer's stated rationale for maintaining the rule.

[7] Anticipating the results of this "balancing" test, the Board said that future analysis would result in rules being placed in one of three categories. However, the Board was careful to note that the "categories are not part of the test itself[; rather] the Board will determine, in future cases, what types of additional rules fall into which category." 365 NLRB No. 154, slip op. at 4

Rules in Category 1 are generally lawful, either because the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of rights guaranteed by the Act, or because the potential impact on protected rights is outweighed by the business justifications associated with the rule. Rules related to basic civility between employees will typically fall within Category 1. 365 NLRB No. 154, slip op. at 3-4, citing William Beaumont Hospital, 363 NLRB No. 162, slip op. at 8 (2016) (Member Miscimarra, concurring in part and dissenting in part). In contrast, Category 3 rules are unquestionably unlawful to maintain, "because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule." 365 NLRB No. 154, slip op. at 3-4.

Between these two ends of the spectrum are rules in Category 2, which are not obviously lawful or unlawful, and must be evaluated on a case-by-case basis to determine "whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications." 365 NLRB No. 162, slip op. at 4. Simply stated, the legality of such rules depends on the context created by the employer's stated justification for infringing on protected conduct. Some rules that fall into category two include: rules regarding disparagement or criticism of the employer (as opposed to civility rules regarding disparagement of employees), and rules banning off-duty conduct that might harm the employer (as opposed to rules banning insubordinate or disruptive conduct at work).

Because the Board held that this framework would be applied retroactively to all pending cases, it is the appropriate vehicle for analyzing Respondent's non-disparagement rule and its no-cell phones rule. 365 NLRB No. 154, slip op. at 16-17. As set forth in detail below, both rules unlawfully restrict employees' ability to engage in activities protected by Section 7 of the Act under current Board law, and should therefore be found to violate Section 8(a)(1) of the Act.

*i. The Non-Disparagement Rule is Overbroad for its Stated Purpose of Preventing Maliciously False Statements*

Respondent's non-disparagement rule instructs employees not to make "statements[,] either oral or in writing, which are intended to injure the reputation of the Company or its management personnel *with* customers or employees," on penalty of immediate discharge for a first offense. [JX 1, page 21 (emphasis added)]. The freedom to criticize management is one of the fundamental precursors of organizing activity; the Board has long found that employees shall not be restricted in exercising this freedom either with each other, or by soliciting support from third parties, including customers. See, e.g., *Claremont Resort & Spa*, 344 NLRB 832 (2005); *Southern Maryland Hospital*, 293 NLRB 1209, 1222 (1989), enfd. in rel. part 916 F.2d 932, 940 (4th Cir. 1990). Respondent's non-disparagement rule therefore chills employees' Section 7 rights by threatening discharge if employees make comments critical of Respondent and its treatment of employees – statements that would "injure [its] reputation" with customers or employees.

Respondent's managers testified that the purpose and intention of the rule is to prevent employees from making malicious and false statements. [Tr. 134, 145]. This intention, while fair, is not actually reflected in the text of the rule. Rather than being narrowly tailored to maliciously false and defamatory statements, the rule as written applies to any statement which might have a negative impact on a customer's or employee's perception of Respondent. Respondent's stated justification for this rule does not outweigh the significance of this potential impact on a reasonable employee.

The non-disparagement rule from the March 17, 2010, handbook should therefore be found to violation Section 8(a)(1) of the Act.

*ii. The No-Cell Phones Rule is Overbroad for its Stated Purpose of Employee Safety*

Respondent's no-cell phones rule states, in relevant part, that "Cell phones will not be allowed in use during work hours or in work areas at any time unless approved by management." [JX 1, page 27]. In *T.R.W. Bearings*, the Board held that:

> Inasmuch as employees may rightfully engage in organizational activities during breaktime and mealtime, rules which restrain, or which, because of their ambiguity, tend to restrain employees from engaging in such activity constitute unlawful restrictions against and interference with the exercise by employees of the self-organizational rights guaranteed them by Section 7 of the Act.

257 NLRB 442, 443 (1981). "Organizational activities" can include traditional organizing activities like solicitation of authorization cards or leafleting, or more inchoate activities like discussions of terms and conditions of employment. Terms such as "work hours" and "company time," " have been long been found to be invalidly overbroad unless clarified that such time does not include nonworking time, such as breaks and lunch periods. See, e.g., *id.*; *North Hills Office Services, Inc.*, 346 NLRB 1099, 1113 (2006) ("prohibitions restricting solicitation during working hours are facially unlawful because they imply a prohibition from the beginning to the end of the shift"), citing *Our Way*, 268 NLRB 394 (1983); see also *Plastic Film Products Corp.*, 238 NLRB 135, 135 (1978); *Stoddard-Quirk Manufacturing Co.*, 138 NLRB 615, 617 (1962).

Because the no-cell phone rule likewise includes the phrase "work hours," which is reasonably understood by employees as being from the beginning of their shift to the end of their shift, it impacts employees' Section 7 rights. Cell phones, the lifeblood of modern communication, are self-evidently important to an organizing campaign. Employees must be free to call, text, and email each other, union organizers, or relevant third parties, when on breaks and mealtimes, just as much as they must be permitted to talk freely aloud amongst themselves in the same time and space.

The potential impact on organizing activities, if cell phone usage is banned during all working hours and in all work areas, is therefore significant.

Per *Boeing*, this unquantifiable but undeniable impact must be measured against Respondent's stated justification for implementing the no-cell phones rule. Respondent's witnesses at the hearing stated that the ban was intended to protect employees, working in the dangerous environment of the railroad tank car repair and maintenance facility, from being distracted while having non-work-related conversations or otherwise using cell phones on the work floor. However, Respondent's rule is overly broad as it prohibits use of cell phones during work hours, which includes break time and lunch time, regardless of location, and thus, interferes with employees' right to engage in Section 7 activity in violation of Section 8(a)(1) of the Act

**B. Graham Bridges' Statements Violate the Act**

"It is well-established Board law that 'an employer violates Section 8(a)(1) of the Act if its conduct may reasonably be said to have a tendency to interfere with the free exercise of employee rights.'" *Corporate Interiors, Inc.*, 340 NLRB 732, 732 (2003), quoting *Frontier Hotel & Casino*, 323 NLRB 815, 816 (1997); *see also American Freightways Co*., 124 NLRB 146, 147 (1959). The intent or motive of the employer is not relevant to this analysis, and "does not turn on whether the coercion succeeded or failed." *American Freightways Co*., 124 NLRB at 147 (1959); *see also EF International Language Schools, Inc.*, 363 NLRB No. 20, slip op. at 11 (2015); *Corporate Interiors, Inc.*, 340 NLRB at 732; *Frontier Hotel & Casino*, 323 NLRB at 816. The standard of inquiry is an objective one, examining the effect of the employer's actions on a reasonable employee. *Rocky Mountain Eye Center, P.C.*, 363 NLRB No. 34, slip op. at 7 (2015); *EF International Language Schools, Inc.*, supra; *Miller Electric Pump*, 334 NLRB 824, 825 (2001).

Sowell and Wallace offered testimony that, if credited, proves that Respondent, via admitted supervisor and agent Bridges, attempted to influence each of them against supporting the Union in late February or early March 2018, exactly as alleged in the Amended Third Consolidated

Complaint. [GCX 1(dd), para. 6, 7(a), and 7(b)]. Bridges' statements to both Sowell and Wallace clearly violate the Act. Bridges threatened that Respondent would not "technically" discharge him if he failed to sign the disaffection petition, but that "they," whom Sowell reasonably took to mean people in "the office," would "find the reasons" to give pretext for such a discharge. [Tr. 89, 94]. Bridges further promised Sowell that Respondent would look favorably in the future on those who signed the petition, making advancement within the company more likely. [Tr. 89-90, 95]. On another occasion, Bridges told Wallace that, but for the Union presence in the facility, he would have received a written training for his first safety violation (failing to sign a "hot work" permit before proceeding to weld inside a tank car), instead of the 30-day suspension he was serving. [Tr. 100-104].

There are several reasons to credit both Sowell and Wallace over Bridges, who generally denied having any conversations with employees about the Union – while admitting that if he did, he would have listened and told them to do what was "best" for them.[8] Although Wallace is no longer an employee of Respondent, having found another job in about September 2018, Sowell, a current employee, is entitled to an inference favoring his credibility over Bridges. *Flexsteel Industries, Inc.*, 316 NLRB 745, 745 (1995) ("the testimony of current employees which contradicts the statements of their supervisors is likely to be particularly reliable because these witnesses are testifying adversely to their pecuniary interests"). Additionally, there is no financial remedy at stake in this case for either Sowell or Wallace. Respondent failed to discredit Sowell on cross-examination by impeaching him with his affidavit given to the Board during the investigation. [Tr. 92-94, 97].

The specific, detailed testimony of Sowell and Wallace should be credited over the generalized denials of Bridges. Sowell and Wallace recalled details about specific conversations

[8] Both Sowell and Wallace testified that lead person Michael Weeks was present, but not a particularly active participant, during their respective conversations with Bridges. Weeks' rote denials in response to leading questions are not credible. [Tr. 168-169].

each had with Bridges. [Tr. 88-91]. For example, Sowell remembered the reason he approached Bridges: he was approached by a coworker, Ms. Moody, who told him he had to sign the "or else we would lose our jobs." [Tr. 88-89]. Sowell testified that Bridges, in response to his question of whether he could be fired for not signing the petition, told him, not "technically" for that, but that they – Respondent – would find the reasons to fire him. [Tr. 89-90]. Sowell also testified that Bridges "mostly" talked about how if, instead, he did sign the petition, there would "be more likely more opportunities in Union Tank Car" for him than if he did not sign it. [Tr. 90].[9] Likewise, Wallace recalled that his conversation with Bridges must have taken place on a Monday, because the next day he went to his other job still upset about the conversation. [Tr. 101-102]. Wallace recalled being a the shop floor meeting table with Bridges and deciding that he would not be going to lunch that day. [Tr. 102].

Meanwhile, between a series of denials to leading questions about this conversation, Bridges testified inconsistently:

> Q: And do you recall a time when employees around February or March were circulating a petition to remove the Union?
>
> A: Yes, sir.
>
> Q: And what was your involvement?
>
> A: None.
>
> Q: Did you ever talk to any employees about that?
>
> A: No. I mean, as far as anything they asked as far as what they could do, it was always up to them. And if any kind of union stuff would come up involved in that year, I would always either walk away or just put a distance between myself and whatever they were talking about.

[Tr. 156].

[9] General Counsel hereby moves to correct the transcript at page 90, line 3, to read "that I would not have if I **didn't sign** it," consistent with the beginning of Sowell's same response, instead of "if I signed it," as currently displayed. As noted by the ALJ several times throughout the hearing, the acoustics in the hearing room were suboptimal; the witnesses, particularly Sowell, also had thick southern Georgian accents.

> Q: If an employee had come to you, such as [Wallace] or [Sowell], and wanted to discuss the Union, what would have been your response?
>
> A: I would have listened to them. And then at the end I would just tell them you have to use your best judgment. I mean, ultimately it's up to you. You got to pick, you know, what's ever better than you think is for you [sic].

[Tr. 160].

> Q: Do you recall having any conversations with Quinn Sowell where the lead man Michael Weeks was also present?
>
> A: [...] Oh, I'm sure.
>
> Q: Okay. Do you recall any conversations specifically around the time of the petition that you had in your office with Mr. Sowell and Mr. Weeks present?
>
> A: No. That's been close to a year ago, so I couldn't remember what kind of conversations that we would've had in front of [Weeks].

[Tr. 163].

> Q: Well, what I'm asking is in your testimony that you gave, you said if anybody brought it up, you would distance yourself, I can't get involved, that sort of thing. And then later in your testimony you said that if they would bring it up, you would listen to them and at the end you would advise them to do what's best for themselves.
>
> A: Okay. Well, I'll clarify it for you. Me being on the floor, having several employees right there and they start talking about that amongst their selves or around me, I would distance myself. Now, if an employee personally comes to me [and] wanted to talk about it, then I would listen.

[Tr. 166-167].

In short, Bridges admitted that in the event an employee came to him with questions about the Union and wanted to talk about it, he would "listen," and counsel them to do what was "best" for them. Furthermore, Bridges admitted that he would not remember specific conversations he had almost a year ago, shortly after denying that he had ever had a conversation with Sowell about the Union.

Additionally, Respondent's argument, advanced at the hearing, that Bridges would not or could not made such threats or promises to Sowell and Wallace is based on irrelevant premises.

First, a supervisor's receipt of training on permissible and impermissible conduct during a union campaign does not permit an inference in favor of their denials. See, e.g., *Nu-Skin International, Inc.*, 320 NLRB 385, 391 (1995) ("the fact that one knows certain conduct should not be engaged in is simply not particularly probative of whether that person actually engaged in the conduct at issue"). Second, although Respondent sought to demonstrate that the 30-day suspension of Wallace was entirely appropriate, that has no bearing on the probity of Bridges *telling* Wallace that it was not, and blaming the Union's presence for it; the Complaint does not allege that the suspension was a violation of Section 8(a)(3). Bridges could have been ribbing Wallace, or even intentionally seeking to poison him against the Union by implying that standards could be more lax if the Union were no longer around. Finally, it is wholly irrelevant whether Bridges himself had the authority to make the employment decisions he was discussing with Sowell and Wallace. Neither Sowell nor Wallace testified that Bridges claimed personal responsibility for such decisions, and Bridges, an admitted agent of Respondent, would be perceived by a reasonable employee as a mouthpiece for company policy and the conduit between decision-makers in "the office" and employees on the shop floor.

Bridges' denials were simply not credible, while Sowell and Wallace testified forthright and consistently. Accordingly, the ALJ should find that Respondent, via Bridges, violated Section 8(a)(1) by threatening employees with discharge, promising them promotions and other unspecified preferential treatment, and telling an employee that he received more severe discipline due to the Union presence at the facility.

### C. Jody James' Break Room Conduct Violates the Act

As an initial matter, the parties do not dispute that James removed Daugherty's pro-Union flyers from the break room tables during the morning break on June 21, 2018, the day before the representation election. Respondent's own supervisor, James, admitted to the essential facts of picking up employees' pro-Union flyers from the break room during their break time. Minor discrepancies about the details exist, such as whether James removed three flyers or three stacks of

flyers; whether a flyer was pulled directly out of an employee's hands, or from the table in front of him; and what the precise configuration of the tables was on the day in question, but the resolution of such discrepancies is largely irrelevant to the core of the matter: in clear view of a group of employees, a front-line supervisor methodically collected all visible pro-Union flyers from a non-working area on non-working time, and, by all credible accounts, called it a "federal violation" as he did so. James' break room conduct on the morning of June 21, 2018, is a per se violation of Section 8(a)(1) of the Act. See, e.g., *VT Hackney, Inc.*, 367 NLRB No. 15, slip op. at 1, fn. 2 (2018) (Board found unlawful disparate enforcement of a rule when supervisor confiscated only pro-union materials from employees' lockers); *Intertape Polymer Corp.*, 363 NLRB No. 187, slip op. at 1-2 (2016) (union flyer confiscation from break room by supervisors, after break had ended, constituted a violation); *Venture Industries*, 330 NLRB 1133, 1134 (2000) (violation found when supervisor confiscated union literature from break room tables in view of single employee).

The witness testimony offered by Daugherty, Queen, Corbett, and Stone, was forthright and logical. Additionally, Corbett, Daugherty, and Stone are all entitled to an inference of credibility as current employees of Respondent.[10] Corbett, Daugherty, and Queen all testified to seeing James "grab" or "snatch" a flyer out of the hands of their coworker, Chad Morgan ("Morgan"). [Tr. 20, 50, 113]. Corbett, Daugherty, Queen, and Stone all testified to hearing James announce that it was "a federal violation" or "a federal offense" or a "civil violation" as he sat down with the collected flyers. [Tr. 21, 50, 73, 113].[11] Corbett, Daugherty, and Stone all testified that Stone then asked James what he'd said, and that James repeated that it was "a federal violation." [Tr. 21, 74, 113].

[10] The recently-discharged Queen, who is seeking reinstatement with Respondent as a remedy for Case 12-CA-230919, filed on November 13, 2018, inarguably did himself no favors in that respect by testifying against James at the hearing.

[11] Queen testified that he heard James say the words "federal offense," but that he thought James was referring to his own action of collecting the flyers, not the presence of the flyers themselves in the break room. [Tr. 53].

On the other hand, Respondent's witnesses presented at the hearing failed to offer a consistent, coherent version of the events of June 21, 2018 – it is questionable whether they were even recounting actual memories of a particular day or merely saying what they thought Respondent's counsel wanted to hear. Morgan himself would not say that James picked up the flyers at all until prompted pointedly by questioning from Respondent's counsel. [Tr. 195-199]. Morgan's denial that James took the paper directly from his hands is therefore not credible. [Tr. 199-200]. Lead person Tim McEady ("McEady"), who by other credible accounts was in the break room prior to James that day, testified rather that when he came into the room, James "was just sitting reading over – yeah, just sitting. Yes ma'am." [Tr. 206]. McEady was also reluctant to describe James' actions in full absent leading questions. [Tr. 206-212]. Clint Selph, another welder sitting near McEady and James that day, and Zachary Timpson, George Padgett, employees in a different department on break at the same time, were not even offered the opportunity to state narratively what James did with the Union flyers. [Tr. 217-219, 224-226]. Welder Dalton Castleberry denied – again in response to a leading question – seeing James even "pick up any papers in the break room." [Tr. 237]. None of Respondent's witnesses were asked even a leading question about whether James called the flyers a federal violation, besides James himself, who predictably denied the allegation. [Tr. 186].

Respondent focused the bulk of its questions of the witnesses on a straw man: whether James prevented any employees from reading the flyers. First and foremost, the subjective impact of the alleged 8(a)(1) conduct on employees is irrelevant to the inquiry. *Rocky Mountain Eye Center, P.C.*, supra; *EF International Language Schools, Inc.*, supra; *Miller Electric Pump*, supra. Second, even assuming *arguendo* that all employees present in the break room between 8:30 a.m. and 8:45 a.m. on June 21, 2018, had a full opportunity to read the paper if they wanted to, the coercive impact of James confiscating the flyers and calling them "a federal violation" would be significant on a reasonable employee. Third, employees on the second and third shifts were inarguably denied the

opportunity to see the flyers that Daugherty intended to leave on the break room tables. Respondent presented no evidence that break room tables were routinely cleared of debris by supervisors throughout the day (or at any time) or that employees were not typically permitted to leave solicitation papers in the break room. [JX 1, page 26 – "No Solicitation Rule"].

The weight of the evidence and Board precedent demonstrates clearly that Respondent, via James unlawfully interfered with employees' free exercise of rights protected by Section 7, in violation of Section 8(a)(1) of the Act, by calling employees' pro-Union flyers "a federal violation" and removing them from the break room tables the day before the representation election that was ultimately decided by just two votes.

## IV. Conclusion

For the foregoing reasons, Counsel for the General Counsel respectfully submits that the Administrative Law Judge should find that Respondent violated Sections 8(a)(1) of the Act in all respects alleged in the Complaint. Counsel for the General Counsel seeks a Board Order requiring Respondent to immediately:

1. Cease and desist its illegal conduct in all respects.
2. Fully remedy Respondent's coercive and restraining statements made to employees.
3. Post a Notice to Employees in English at its Valdosta, Georgia facility.[12]

Counsel for the General Counsel also requests that the Administrative Law Judge order any other relief deemed just and proper to effectuate the purposes of the Act.

Dated: December 19, 2018.

Respectfully submitted,

**/s/ Caroline Leonard**

Caroline Leonard, Esq.
Counsel for the General Counsel
National Labor Relations Board, Region 12
Email: caroline.leonard@nlrb.gov

[12] A proposed Notice to Employee is attached hereto.

**ATTACHMENT**

# NOTICE TO EMPLOYEES

**POSTED BY ORDER OF THE**
**NATIONAL LABOR RELATIONS BOARD**
**An Agency of the United States Government**

**The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.**

**FEDERAL LAW GIVES YOU THE RIGHT TO:**

- Form, join, or assist a union;
- Choose a representative to bargain with us on your behalf;
- Act together with other employees for your benefit and protection;
- Choose not to engage in any of these protected activities.

**WE WILL NOT** threaten to discharge you or otherwise discriminate against you if you refuse to sign a petition to remove International Association of Sheet Metal, Air, Rail, and Transportation Workers (SMART) (the Union) as your exclusive collective-bargaining representative.

**WE WILL NOT** promise you promotions, preferential treatment, or other benefits if you abandon support for the Union.

**WE WILL NOT** tell you that discipline would be less severe if the Union no longer represented our employees.

**WE WILL NOT** confiscate Union literature from you, or prohibit you from reading Union literature in our break room or other non-working areas of our premises during non-working time.

**WE WILL NOT** in any like or related manner interfere with, restrain, or coerce you in the exercise of your above-stated rights under Section 7 of the National Labor Relations Act.

**WE HAVE** rescinded the following rules in our Hourly Employee Handbook dated March 10, 2017, and **WE WILL NOT** enforce these rules anymore:

> Shop Rule 32, prohibiting:
>
> Statements either oral or in writing which are intended to injure the reputation of the Company or its management personnel with customers or employees.
>
> **Use of Telephone:**
>
> Cell phones will not be allowed in use during work hours… at any time unless approved by management.

**UNION TANK CAR COMPANY**

_____

(Employer)

Dated: By:

(Representative) (Title)

---

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. We conduct secret-ballot elections to determine whether employees want union representation and we investigate and remedy unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below or you may call the Board's toll-free number 1-866-667-NLRB (1-866-667-6572). Hearing impaired persons may contact the Agency's TTY service at 1-866-315-NLRB. You may also obtain information from the Board's website: www.nlrb.gov.

201 E Kennedy Blvd Ste 530 **Telephone:** (813)228-2641

Tampa, FL 33602-5824 Hours of Operation: 8 a.m. to 4:30 p.m.

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THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

This notice must remain posted for 60 consecutive days from the date of posting and must not be altered, defaced or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the above Regional Office's Compliance Officer.

## CERTIFICATE OF SERVICE

I hereby certify that the foregoing document, Counsel for the General Counsel's Post-Hearing Brief to the Administrative Law Judge, was served on December 19, 2018, as follows:

**By electronic filing:**

National Labor Relations Board
Hon. Arthur J. Amchan
Deputy Chief Administrative Law Judge
Division of Judges
1015 Half Street SE
Washington, D.C. 20570-0001

**By electronic mail to:**

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